

SOUTH AFRICA / JUDGMENT

Gaoromelwe v S (CA 38/10)

[2011] ZANWHC 8 (4 March 2011)

[2011] ZANWHC 8**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks, A M Kgoele

CASE / FILE NUMBER

CA 38/10

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IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 38/2010

In the matter between:-

OBAKENG MOSES GAOROMELWEApplicant

and

THE STATERespondent

APPLICATION FOR LEAVE TO APPEAL

DATE OF HEARING : 25 FEBRUARY 2011

DATE OF JUDGMENT : 04 MARCH 2011

COUNSEL FOR THE APPLICANT : ADV SKIBI

COUNSEL FOR THE RESPONDENT : ADV RASAKANYA

JUDGMENT

HENDRICKS J

[A] Introduction:-

- [1] This is an application for leave to appeal to the Supreme Court of Appeal against the sentence imposed on the Applicant. The Applicant was convicted in the Regional Court on a charge of housebreaking with intent to rape and rape and was sentenced to an effective term of imprisonment for ten (10) years. Leave to appeal his conviction and sentence was granted by the Regional Court.

[2] On appeal before me and my sister Kgoele J, the appeal against conviction was dismissed and although the appeal against sentence was upheld, the sentence remained unaltered. The present application for leave to appeal is against sentence only.

[B] Sentence:-

[3] In the judgment on appeal, I stated clearly that the Regional Magistrate convicted a gross irregularity by not informing the Applicant (accused) of the provisions of Section 52 of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Act).

[4] It was further stated that because of the said irregularity that was committed, we as Court of Appeal was at liberty to consider the sentence afresh, which we did and concluded that:-

“Having regard to the personal circumstances of the Appellant, the nature and the seriousness of the offence of which he is convicted of, the interest of society and all the other factors relevant for the impositioning of a suitable sentence, a term of imprisonment of ten (10) years is appropriate. So, in effect, although the Magistrate erred and misdirected himself by not informing the Appellant of the provisions of the Minimum Sentence Act, he nevertheless imposed an appropriate sentence.”

[5] Mr Skibi on behalf of the Applicant contended that it follows automatically that since the Court of Appeal found that an irregularity was committed by the trial court, a lesser sentence should have been imposed. I am in respectful disagreement with this submission.

[6] It does not follow automatically and by necessary implication that the sentence should be altered and substituted with a lesser sentence merely because an irregularity was committed by the trial court.

[7] Much depends on the said irregularity and whether or not it vitiates the whole proceedings. Not every irregularity, especially with regard to sentence, will automatically lead to the setting aside of the sentence and impose in its place a lesser sentence.

[8] All that needs to be done by the court sitting as a Court of Appeal is to look afresh at what an appropriate sentence will be under the particular circumstances of the case. This is exactly what we did as a Court of Appeal.

[9] It is incumbent upon an application in an application such as this to prove the existence of reasonable prospects of success on appeal. Put differently, the Applicant must show that a reasonable possibility exist that another court may come to a different decision than the one arrived at based on the facts presented.

[C] Conclusion:-

[10] I have carefully considered whether there are reasonable prospects of success on appeal and I can not find any. No other court, acting reasonably on the facts of this case, would come to a different decision as to what an appropriate sentence will be, than what the Court of Appeal had arrived at.

[11] The application for leave to appeal should therefore fail.

[D] Order:-

[12] Consequently, the following order is made:-

The application for leave to appeal to the Supreme Court of Appeal against the sentence imposed is dismissed.

R D HENDRICKS

JUDGE OF THE HIGH COURT

I agree.

A M KGOELE

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